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Before the
Federal Communications Commission
Washington, D.C. 20554

JUL - 1 2004
Federal Communications Commission
Office of Secretary

In the Matter of)
)
BellSouth Emergency Petition for)
Declaratory Rule and Preemption of)
State Action)
)
_____)

WC Docket No. 04-_____

**EMERGENCY PETITION FOR DECLARATORY RULING
AND PREEMPTION OF STATE ACTION**

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") brings this emergency petition to enforce the unambiguous provisions of the 1996 Act and clear Commission precedent by 1) declaring that it, and not state commissions, enforce the provisions of Section 271, and 2) preempting a recent order of the Tennessee Regulatory Authority that illegally asserts enforcement authority. On June 21, 2004, the Tennessee Regulatory Authority ("TRA") issued an order that claims to set a "market rate" for switching for customers with four or more lines in the Top 50 MSAs in the context of a section 252 arbitration, citing its authority under "section 271 of the Act." The TRA issued this ruling despite clear pronouncements from this Commission that state commissions have no authority under section 271 to regulate elements provided only pursuant to section 271 ("271 elements").¹ This action by the TRA unquestionably violates the statute, Commission orders, and federal precedent. Critically, it also has the effect of bringing uncertainty to the regulatory scheme at a time in which certainty in the

¹ Critically, last week DIECA Communications, Inc. (d/b/a Covad) filed petitions in 7 states in BellSouth's region seeking the exercise of state commission jurisdiction over line sharing pursuant to Sections 271, 201 and 202. While no state commission has acted on these petitions yet, it is critical that the Commission act quickly to ensure that no other state commission unlawfully exercises jurisdiction over non-251 elements. A copy of the Covad petition from Alabama is attached hereto (with attachments omitted) as Exhibit A for illustrative purposes.

regulatory landscape is critical and terminating any incentive of carriers to enter into commercial agreements.

STATEMENT OF FACTS

On February 7, 2003, ITC^DeltaCom filed a petition for arbitration of an interconnection Agreement pursuant to Section 252 with the TRA. Issue 26 of the Parties' issues list specified as follows:

Local Switching – Line Cap and Other Restrictions

- (a) Should the interconnection agreement include language that prevents BellSouth from imposing restrictions on DeltaCom's use of local switching?
- (b) Should BellSouth provide local switching at market rates where it is not required to provide local switching as a UNE?
- (c) If so, what should be the rate?

Issues List, August 15, 2004, Docket No. 03-00119, attached hereto as Exhibit B. Specifically, the parties dispute focused on the rates, terms and conditions for switching in cases in which BellSouth qualifies for the Section 251 switching exemption under Rule 51.319(c)(2). DeltaCom took the position that BellSouth had no restrictions on its obligation to provide local switching as a Section 251 UNE "unless BellSouth can demonstrate harm to its network." *Issues List*, at 12.

In response to Issue 26(b) and (c), BellSouth stated as follows:

- (b) BellSouth will provide local switching at market-based rates where BellSouth is not required to unbundled local switching.
- (c) An arbitration under § 251 of the 1996 Act is not the appropriate forum for resolution of this issue.

Id. In other words, BellSouth's position was that for non-251 switching, BellSouth would provide it pursuant to Section 271 at market-based prices.

Consistent with its stated position in the Issues List, BellSouth maintained its position that the TRA did not have jurisdiction over the market rate throughout the proceeding. For example, BellSouth filed the testimony of Kathy Blake, which set forth the position that the state commission had no jurisdiction to regulate switching that BellSouth did not provide pursuant to Section 251. *Direct Testimony of Kathy Blake*, August 4, 2003, Docket No. 03-00119, attached hereto as Exhibit C. In its post-hearing brief, BellSouth argued that “the TELRIC pricing standards do not apply to non-UNE switching; thus, the Authority has no jurisdiction, as a matter of law, in the context of a Section 252 arbitration proceeding, to set such rates.” *BellSouth’s Post-Hearing Brief*, Docket No. 03-00119, at 54, excerpt attached as Exhibit D. BellSouth further argued that “[t]he appropriate pricing standard for non-UNEs is found in Sections 201 and 202 of the 1996 Act” and that the FCC (not state commissions) will be the final arbiter of whether a non-UNE rate is ‘just and reasonable’ under the 1996 Act.” *Id.* at 54-55. BellSouth reiterated its position that the state commission lacks jurisdiction over this issue after the briefing schedule. *See* April 8, 2004 Letter from Guy Hicks to Hon. Deborah Taylor Tate, Docket No. 03-00119, at 1 fn. 1 (“[t]here is no jurisdiction in a 252 arbitration to consider – much less set – rates for services that are not required to be provided at UNE rates...[y]et, CLECs have a forum to address this matter – the FCC. Only the FCC has jurisdiction to determine whether market rates are just and reasonable in the event of a dispute”).

Despite ample evidence in the record and in the face of clear Commission precedent, the TRA held that it had jurisdiction to regulate the rates, terms and conditions of switching provided pursuant to Section 271. On Monday, June 21, 2004, the TRA established an interim rate for switching provided pursuant to Section 271 subject to true-up at the conclusion of a generic

docket conducted by the TRA or conclusion of successful commercial negotiations.² *Transcript of Proceeding*, 6/21/04, at 8-9, attached hereto as Exhibit E. The TRA voted 2-1 for the following motion:

Why don't I just make a separate motion that we adopt the DeltaCom final best offer of 5.08 and establish that as an interim rate subject to true up and request that the chair open a generic docket to adopt a rate for switching outside 251 requirements.

Transcript of Proceedings, 6/21/04, at 8, Exhibit E.

The improper assertion of jurisdiction underlying the TRA's decision is evident from the deliberations that preceded the TRA's vote. First, one Director stated the issue before the TRA as being "a determination as what the market rate should be for unbundled switching provided pursuant to Section 271 of the Act." *Transcript of Proceeding*, at 4. While he went on to accurately state the standard for regulating rates for 271 elements ("the pricing for them and market base [sic] has a particular standard of just and reasonable"), and accurately referenced the test for assessing whether a rate is just and reasonable,³ the TRA erred in concluding that it had the jurisdiction to regulate the rate or any other term or condition of the 271 elements.

Transcript of Proceeding, at 4. Second, prior to making the motion upon which the TRA voted, another Director asked that the TRA adopt DeltaCom's rate as an interim rate "and further request[s] that [the Chairman] open a docket to adopt a rate for switching outside of 251 requirements." *Transcript of Proceedings*, at 6 (emphasis added). The TRA Directors agreed

² Of course, the rate setting by the TRA effectively eliminates any hope for commercial negotiation of unbundled switching.

³ "BellSouth failed to demonstrate that its proposed final best offer, its 271 switching rate, is at or below the rate at which BellSouth offers comparable functions to similarly situated purchasing carriers under its interstate access tariff or that the 271 switching element final best offer is reasonable by showing that it has entered into arm's length agreements with other similarly situated purchasing carriers to provide as inclusive standalone switching at the rate proposed in the final best offer."

“that it would be appropriate to open a generic docket,” thereby asserting jurisdiction to set a permanent rate. *Id.* at 7.

The TRA’s decision fundamentally misconstrues the law and will thwart federal policy and this Commission’s encouragement of commercial negotiations.

ARGUMENT

I. THE COMMISSION SHOULD DECLARE THAT STATE COMMISSIONS HAVE NO JURISDICTION OVER ELEMENTS PROVIDED PURSUANT TO SECTION 271 FOR WHICH THERE IS NO COMMISSION IMPAIRMENT FINDING UNDER SECTION 251.

To avoid state commission regulation of network elements provided under section 271 and for which there is no impairment finding under section 251, the Commission should reinforce its previous rulings and declare that state commissions have no jurisdiction over the rates, terms and conditions of elements provided by RBOCs to CLECs pursuant to section 271.

A. RBOCs currently have section 271 obligations that are separate and apart from the unbundling obligations set forth in section 251.

Absent forbearance by this Commission, RBOCs currently are obligated under 47 U.S.C. § 271 to provide certain enumerated network elements to CLECs irrespective of whether CLECs are impaired without access to such elements.⁴ *Triennial Review Order*, at ¶ 653. This “independent and ongoing access obligation” is based, according to the Commission, upon the language and structure of Section 271(c)(2)(B) and upon the Commission’s decision “to interpret sections 251 and 271 as operating independently.” *Id.*; see also *UNE Remand Order*, at ¶ 470.⁵

⁴ This position is consistent with the position set forth in BellSouth’s pending Petition for Forbearance, filed March 1, 2004, in which BellSouth argued that Section 271 elements are not subject to Section 251 unbundling obligations.

⁵ “If a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a).”

Section 251, on the one hand, requires that RBOCs unbundle only those network elements for which “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” 47 U.S.C. § 251(d)(2)(B). By contrast, even absent a finding of impairment, RBOCs are currently obligated to provide certain elements, including loops and switching, pursuant to section 271. 47 U.S.C. § 271(c).

B. State Commissions have no jurisdiction over elements provided pursuant to Section 271.

Section 271 vests authority in the Commission to regulate network elements provided pursuant to that section for which no impairment finding has been made. 47 U.S.C. § 271. For example, section 271(d)(1) provides that to obtain interLATA relief, a BOC “may apply to the Commission for authorization to provide interLATA services....” 47 U.S.C. 271(d)(1). Congress gave this Commission the exclusive authority for “approving or denying the authorization requested in the application for each State.” 47 U.S.C. § 271(d)(3); *see also South Carolina 271 Order*, ¶ 29 (“although the Commission will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission’s role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met”). And, of particular relevance here, once a BOC has obtained Section 271 authority (as BellSouth has in Tennessee), continuing enforcement of section 271 obligations rests solely with the Commission. 47 U.S.C. § 271(d)(6). Section 271(d)(6)(A) provides that

if at any time after the approval of an application under paragraph (3), *the Commission* determines that a Bell operating company has ceased to meet any of the conditions required for such approval, *the Commission* may, after notice and opportunity for a hearing [impose sanctions].

Id.; see also 47 U.S.C. § 271(d)(6)(B) (“[t]he Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3)”) (emphasis added).

The only role Congress gave the state commissions in section 271 is a consultative role during the approval process. 47 U.S.C. § 271(d)(2)(B). The statute provides that the Commission “shall consult with the State commission”; the directives to approve or deny applications and to decide enforcement matters is exclusively given to the Commission and no specific responsibility is delegated to the state commissions. *Id.*

The conclusion that this Commission, not state authorities, enforces Section 271 is bolstered by the plain text of Section 252. Section 252 grants specific authority to the state commissions, but explicitly limits that authority to those agreements entered into “pursuant to section 251.” 47 U.S.C. § 252(a)(1). For instance, only agreements requested “pursuant to Section 251” “shall be submitted to the State Commission” for approval under Section 252(e).⁶ Similarly, the competitive carrier’s initial “request” for an agreement “pursuant to Section 251” triggers the state arbitration period in Section 252(b),⁷ and only such agreements are available for arbitration by state commissions under Section 252(c) and (d).⁸

Of equal importance, under Section 251(c)(1), state commissions are authorized to impose arbitrated results only to ensure that any agreements “meet the requirements of Section 251;” Congress did not authorize a state commission to ensure that an agreement satisfies Section 271. Indeed, of particular relevance here, the state commission’s authority to set rates is

⁶ 47 U.S.C. § 252(a)(1) & (e). And, a state may only reject an agreement “if it finds that the agreements do not meet the requirements of Section 251.” 47 U.S.C. § 252(e)(2)(B).

⁷ 47 U.S.C. § 252(b)(1)

⁸ 47 U.S.C. § 252(b) & (c).

specifically tied to the requirements of Section 251. See 47 U.S.C. § 252(c)(2), (d)(1) (authorizing state commissions to set rates “for purposes of” the interconnection and access to network elements required by Sections 251(c)(2) and (c)(3). In sum, Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations. See also *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F. 3d 1269, 1274 (11th Cir. 2002) (requirement that ILEC negotiate items outside of section 252 “is contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate. See 47 U.S.C. §§ 251(b), (c) (setting forth the obligation of all local exchange carriers and incumbent local exchange carriers, respectively).”

C. Section 271 elements for which no impairment finding has been made under section 251 are regulated under Section 201 and 202 of the Act.

The fact that elements provided pursuant to Section 271 for which there is no finding of impairment are regulated under Sections 201 and 202 should be uncontroversial.⁹ In the *UNE Remand Order*, the Commission held:

If a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a).

UNE Remand Order, at ¶ 470. In the Texas 271 Order, the Commission stated unequivocally with respect to directory assistance and operator services that because they had been removed “from the list of required unbundled network elements,” they no longer fell “within a BOC’s obligations to provide unbundled network elements” and thus were “not subject to the requirements of sections 251 and 252, including the requirement that rates be based on forward-looking economic costs.” *SWBT Texas Order*, at ¶ 348. More specifically, the Commission held

⁹ The TRA accurately set forth the test, *Transcript of Proceedings*, at 4, but then chose not to apply it.

that “[c]hecklist item obligations that do not fall within a BOC’s UNE obligations, however, still must be provided in accordance with sections 201(b) and 202(a), which require that the rates and conditions be just and reasonable, and not unreasonably discriminatory.” *Id.*

The Commission explicitly confirmed that elements provided pursuant to Section 271 for which there is no impairment finding under Section 251 are regulated under Sections 201 and 202. In the *Triennial Review Order*, the Commission held that “whether a particular checklist item’s rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact specific inquiry” that the FCC will undertake either in the context of an application for interLATA authority under Section 271 or in an enforcement proceeding brought pursuant to Section 271(d)(6). *Triennial Review Order*, at ¶ 664. The Commission also decided “that the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis—the standards set forth in Sections 201 and 202,” *id.* at ¶ 656, and noted that “no party has suggested in [the TRO] proceeding that the Commission’s interpretation of the statute has produced a perverse policy impact with respect to a BOC’s provision of these network elements.” *Triennial Review Order*, at ¶ 661.

In *USTA II*, the D.C. Circuit affirmed the Commission’s decision on the pricing standard for 271 elements in the *Triennial Review Order* and rejected the CLECs’ contrary position holding that “the CLECs have no serious argument that the text of the statute clearly demonstrates that the §251 pricing rules apply to unbundling pursuant to §271 checklist items four, five, six and ten.” *USTA II*, at 52. The Court also agreed “that none of the [nondiscrimination] requirements of §251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist,” while recognizing that “[o]f course, the independent unbundling

under § 271 is presumably governed by the *general* nondiscrimination requirement of § 202.”
Id. at 53.

The Commission has held that it retains exclusive jurisdiction to regulate Section 271 elements under Sections 201 and 202. For example, “whether a particular checklist element’s rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that *the Commission* will undertake in the context of a BOC’s application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).” *Triennial Review Order*, at ¶ 664 (emphasis added). The law provides only two enforcement mechanisms available for an RBOC’s compliance with Section 271 requirements – a 271 application and a 271 enforcement proceeding. Because both mechanisms are vested entirely with the Commission, its jurisdiction over 271 elements is necessarily exclusive.

Courts uniformly have held that claims based on Sections 201(b) and 202(a) are within the Commission’s jurisdiction. Section 201(b) speaks in terms of “just and reasonable” which are determinations that “Congress has placed squarely in the hands of the Commission.” *In Re: Long Distance Telecommunications Litigation*, 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff’d.*, 99 F.3d 448 (D.C. Cir. 1997). As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996), Sections 201(b) and 202(a) “authorized the Commission to establish just and reasonable rates, provided that they are not unduly discriminatory.”

The idea of Commission regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. Congress “unquestionably” took “regulation of local telecommunications competition away from the State” on all “matters addressed by the 1996 Act” and required that state commission regulation be guided by Commission regulations. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004).

II. TO AVOID CIRCUMVENTION OF THE REGULATORY SCHEME ESTABLISHED BY THE ACT, THE COMMISSION SHOULD DECLARE UNLAWFUL AND PREEMPT THE ORDER OF THE TRA ASSERTING JURISDICTION UNDER SECTION 271.

This Commission is authorized to issue declaratory rulings under section 1.2 of its General Rules of Practice and Procedure: “The Commission may, in accordance with section 5 (d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.” 47 C.F.R. § 1.2. While it is not necessary for a petitioner to show a “case or controversy in the judicial sense” in order to obtain declaratory relief from the Commission,¹⁰ there must be a showing of a “genuine controversy or uncertainty [that] requires clarification.”¹¹ The Commission has “broad and discretionary powers” to issue declaratory relief.¹²

¹⁰ Memorandum Opinion and Order, *Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 93 F.C.C.2d 1287, 1290, ¶ 9 (1983) (internal quotation marks omitted).

¹¹ Memorandum Opinion and Order, *BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Building Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises*, 6 FCC Rcd 3336, 3342-43, ¶ 27 (1991).

¹² Memorandum Opinion and Order, *Telerent Leasing Corp. et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C.2d 204, 213, ¶ 21 (1974) (“Telerent”).

The purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists.¹³ The Commission has previously held that declaratory relief was especially appropriate to address uncertainty and confusion caused by a communications company having to comply with state regulatory decisions that were contrary to prior FCC decisions. *See Telerent*, 45 F.C.C.2d at 214, ¶ 22, 220, ¶ 38 (“We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection as a result of these State actions.”; “No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication . . .”).

Thus, this Commission has every right and reason to preempt any state commission determination that attempts to regulate the rates, terms, or conditions of any element provided pursuant to Section 271.

When state commission action conflicts with federal policy, a federal agency can preempt the state action. *Triennial Review Order*, at ¶ 196 (citing, *inter alia*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is “nullified” by the Supremacy Clause)). As the Commission has held, “states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in [the *Triennial Review Order*].” *Id.* (citing, *inter alia*, *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 154 (1982) (“A pre-emptive regulation’s force does not depend on express congressional authorization to displace state law”)). The Commission expressly invited aggrieved parties to

¹³ See Memorandum Opinion and Order, *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission’s Rules and Regulations*, 92 F.C.C.2d 864, 879, ¶ 43 (1983).

file petitions for declaratory ruling such as this one where state commission determinations are contrary to the principles set forth in the *Triennial Review Order*. *Triennial Review Order*, at ¶ 195.

The plain language of Section 271, and the Commission's orders interpreting Section 271, limit state regulatory authority to those elements unbundled pursuant to Section 251 and not those provided pursuant to Section 271. A state commission's assertion of jurisdiction over elements provided pursuant to Section 271 would "thwart or frustrate" the federal regime set forth in the *Triennial Review Order*.¹⁴ The Commission held that the Act requires that "the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in Sections 201 and 202." *Triennial Review Order*, at ¶ 656. In direct contravention of that federal policy, the TRA made "a determination as what the market rate should be for unbundled switching provided pursuant to Section 271 of the Act." *Transcript of Proceedings*, at 4. The TRA was explicit about the fact that it was acting under Section 271 and its plans to "open a docket to adopt a [permanent] rate for *switching outside of 251 requirements*." *Transcript of Proceedings*, at 6 (emphasis added).

The Commission has held that as a matter of national policy, it retains exclusive jurisdiction to regulate elements provided pursuant to Section 271. By asserting jurisdiction over such elements, the TRA has displaced the federal public interest determination as to how the local networks should be regulated and thwarted the implementation of that regulatory scheme. The TRA's action is especially troubling given the negative effect it will have on commercial

¹⁴ Importantly, lack of state jurisdiction does not deprive CLECs of a forum to challenge rates; that forum, however, is the Commission.

negotiations. Specifically with pricing, but the same is true of all terms and conditions, the Commission recognized that a finding of no impairment

is predicated in large part upon the fact that competitors can acquire switching in the marketplace at a price set by the marketplace. Under these circumstances, it would be *counterproductive* to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.

UNE Remand Order, at ¶ 473 (emphasis added). The Commission should prevent such counterproductive activities by the state commissions.

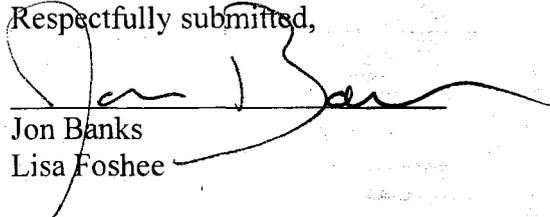
In sum, the Commission should act on this Petition because the action of the TRA frustrates the mechanism Congress implemented to govern the regulation and development of local service competition. *See Indiana Bell Telephone Company*, 359 F.3d at 497 (state commission action “preempted where what the state has done is an obstacle to the execution of Congress’s purpose or frustrates that purpose by interfering with the methods Congress selected to achieve a federal goal even when the state goal is identical to the federal goal...”). Permitting state commissions to regulate network elements for which no impairment has been found will jeopardize the development of true market-based competition by leaving no room for the commercial negotiations this Commission has lauded as the means by which competition should grow.¹⁵

¹⁵ The TRA Chairman, citing her preference for negotiated market-based rates, dissented from her colleagues’ vote. *Transcript of Proceedings*, at 7.

REQUEST FOR RELIEF

Accordingly, the Commission should declare that states have no authority to regulate elements provided pursuant to Section 271. In addition, the Commission should preempt the order of the TRA purporting to exercise state authority over Section 271 elements.

Respectfully submitted,



Jon Banks
Lisa Foshee

BellSouth Telecommunications, Inc.
675 West Peachtree Street, Suite 4300
Atlanta, Georgia 30375

542461

Exhibit A

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

Petition of DIECA Communications, Inc.,)
d/b/a Covad Communications Company, for) Docket No.
Arbitration of Interconnection Agreement)
Amendment with BellSouth)
Telecommunications, Inc. pursuant to)
Section 252(b) of the Telecommunications)
Act of 1996)

PETITION FOR ARBITRATION

NOW COMES, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") and respectfully submits this Petition for Arbitration in accordance with Section 12 and 16 of the Parties' Interconnection Agreement; 47 U.S.C. § 252; and Rules, Regulations and Orders of this Commission, including, without limitation, Rule T-26.

Communications regarding this Petition should be directed to:

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Covad respectfully requests that the Alabama Public Service Commission ("Commission") resolve one important open issue resulting from the interconnection negotiations between Covad and BellSouth Telecommunications, Inc. ("BellSouth") (BellSouth and Covad are collectively referred to herein as the "Parties"). Covad requests that the Commission resolve the issue designated herein by ordering the Parties to amend their interconnection one "B" agreement to incorporate Covad's position. This Petition includes: (1) the Prefiled Testimony of William H. Weber; (2) the General Terms and Conditions and Attachment 2 to the Parties' current interconnection agreement (Attachment

A) (the entire interconnection agreement is on file with the Commission); (3) The disputed issue for which Covad seeks Commission resolution, with the position of the Parties on the issue and reference to the applicable section of the agreement (Attachment B); and (4) a matrix depicting the suggested language of Covad and BellSouth on the disputed issue (the "Proposed Language Matrix") (Attachment C).

PARTIES

1. Covad is a Virginia corporation and a wholly-owned subsidiary of Covad Communications Group, Inc., a publicly traded corporation formed under the laws of the state of Delaware. Covad is a telecommunications carrier authorized to provide telecommunications services in the State of Alabama.
2. BellSouth is a corporation organized and formed under the laws of the State of Georgia. BellSouth is a certificated local exchange and intraLATA interexchange carrier and currently provides local service, intraLATA service and other services within its certificated areas in Alabama. BellSouth is an incumbent local exchange carrier ("ILEC") in Alabama as defined by Section 251(h) of the Act. 47 U.S.C. §251(h). BellSouth is also a regional Bell operating company ("RBOC") as defined by 47 U.S.C. §153 and 274(i)(3). Within its operating territory, BellSouth has been the incumbent local exchange provider of telephone exchange services at all relevant times.

JURISDICTION

3. Jurisdiction over this matter is conferred by 47 U.S.C. § 252 as interpreted by the Fifth Circuit Court of Appeal in *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003), providing that "where the parties have voluntarily included in negotiations issues other than those duties required of

an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations.” Here, BellSouth proposed an amendment to the parties’ interconnection agreement, including proposed rates, to implement the line sharing transition plan created by the FCC in the *TRO* under its Section 201(b) jurisdiction – not under Section 251. *TRO* ¶ 267 (providing that “Section 201(b) gives the Commission broad authority to adopt the transition mechanism set forth in this Part and nothing in that provision limits our authority with respect to rates.”). Covad responded to BellSouth’s request to negotiate (including BellSouth’s proposed amendment) with a counter-proposal. Covad agreed to voluntarily negotiate non-251 access to line sharing, but counter-proposed an amendment to set rates under Section 201’s “just and reasonable” standard on the ground that BellSouth was subject to an obligation to provide access to line sharing under Section 271, along with its accompanying “just and reasonable” pricing standard. *TRO* ¶¶ 661-664. Accordingly, BellSouth and Covad entered into voluntary negotiations for non-251 access to line sharing. Having failed to reach agreement over that access, Covad submits the dispute under Section 252 and pursuant to the timeline contained in the parties’ interconnection agreement.

4. This Commission has jurisdiction over Covad’s Petition pursuant to sections 12 and 16 of the Parties’ Interconnection Agreement (“Agreement”). Attachment A, Sections 12 and 16. The Commission also has jurisdiction over

Covad's Petition pursuant to 47 U.S.C. § 252 as well as Rules, Regulations and Orders of this Commission, including, without limitation, Rule T-26. On December 4, 2003,¹ BellSouth provided Covad with proposed amendments to the Parties Agreement related to the Federal Communications Commission's Triennial Review Order pursuant to Section 16.3, the change of law provision, of the Parties' Agreement. In thirty-two (32) separate paragraphs and an Exhibit containing rates BellSouth's proposed amendments to Attachment 2 of the Agreement related to line sharing rates, terms and conditions. On April 16, 2004, Covad provided BellSouth with its counter-proposal regarding amendments related to line sharing rates, terms and conditions.

5. Section 16 of the Agreement provides that in the event that proposed amendments to implement changes in law are not renegotiated within ninety (90) days after a party requests such a negotiation, the dispute shall be referred to the Dispute Resolution procedure set forth in the Agreement. Section 12, entitled Resolution of Disputes, provides that in the event that there is a dispute, "either Party may petition the Commission for a resolution of the dispute." Accordingly, Covad respectfully petitions the Commission to resolve the Parties' dispute over access to line sharing.

PARTIES' NEGOTIATIONS VIS-À-VIS SECTION 251 – RULE T-26(2)(b)

6. Covad adopts by reference paragraph 3 of this petition and further states: BellSouth has an obligation to provide access to line sharing under 47 U.S.C. § 271(c)(2)(B)(iv) because line sharing has always been and remains a checklist

¹ See Rule T-26(2)(a).

item 4 loop transmission facility and RBOCs offering long distance services pursuant to 271 authority have an obligation to provide checklist item 4 elements irrespective of unbundling determinations under 251, albeit under a different pricing standard. The pricing standard for network elements provided pursuant to 271 obligations is the "just and reasonable" standard provided in 47 U.S.C. § 201. This position is supported by the FCC's Triennial Review Order at paragraphs 649-667, as well as the previous orders of the FCC granting BellSouth 271 authority.

STANDARD OF REVIEW

7. This arbitration must be resolved by the standards established in Sections 201, 202, 252 and 271 of the Act and the effective rules adopted by the Federal Communications Commission ("FCC").

ISSUES IN DISPUTE

8. While BellSouth proposed numerous changes to the Parties Interconnection Agreement in its December 4, 2003 proposed TRO amendment, Covad and BellSouth have only exchanged proposed language regarding line sharing. Moreover, many of the changes proposed by BellSouth were (or will be when the mandate issues) reversed and/or vacated by the March 2, 2004 decision of the United States District Court of Appeals for the District of Columbia Circuit. Line sharing, however, was not one of the issues reversed or vacated. As a consequence, Covad only seeks Commission resolution as to a single open issue: line sharing, as set forth in Attachments B and C to this Petition. Attachment B includes a short description of the issue, assigns the issue a

number, sets forth the position of Covad and BellSouth, and identifies the section(s) of the Interconnection Agreement which are affected.

9. Attachment C to this Petition is the Proposed Language Matrix, which depicts the proposed language of Covad and BellSouth on the disputed issue. Rule T-26(2)(b).
10. Covad respectfully requests expedited treatment of this petition because it presents only one issue for review and because BellSouth has taken the position that it will no longer be obligated to provide line-sharing after October, 2004. To the extent BellSouth remains steadfast in this position, Covad respectfully requests an order maintaining the status quo pending the outcome of this Arbitration Petition. See Rule T-26(2)(e) & (f).
11. Discovery should not be required in this proceeding. See Rule T-26(2)(g).

RELIEF REQUESTED

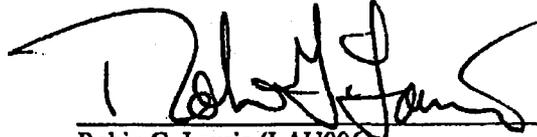
WHEREFORE, Covad respectfully requests that the Commission arbitrate the open issue identified in this Petition in accordance with Sections 201, 202, 252 and 271 of the Federal Telecommunications Act of 1996, and adopt the positions of Covad as set forth therein, and require the parties to amend their Interconnection Agreement to incorporate and adopt the specific terms and contract language proposed by Covad, which are identified in the Proposed Language Matrix (Attachment C).

Covad further requests that the Commission order the Parties to file on a date certain an amended Interconnection Agreement (between Covad and BellSouth), incorporating the Commission's decision as described above, for approval by the Commission pursuant to Section 252(e) of the Act.

CONCLUSION

For all the foregoing reasons, Covad respectfully requests this Commission resolve the issue identified in favor of Covad and by approving the attached proposed interconnection agreement.

Respectfully submitted this ~~7~~⁴rd day of June, 2004,



Robin G. Laurie (LAU006)
One of the attorneys for Covad
Communications Company

OF COUNSEL:
Balch & Bingham LLP
P. O. Box 78
Montgomery, Alabama 36101
334-834-6500

Charles E. Watkins
Covad Communications
1230 Peachtree Street
19th Floor
Atlanta, Georgia 30309
(404) 942-3492

VERIFICATION

STATE OF GEORGIA)
)
COUNTY OF FULTON)

Before me, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid personally came and appeared Charles E. Watkins who, being by me first duly sworn, deposed and said that:

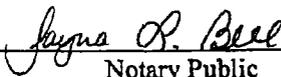
He is the Senior Counsel of DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), Petitioner in the foregoing proceeding, that he has read the foregoing Petition for Arbitration filed on behalf of Covad and knows the contents thereof; that the same are true of his knowledge, except as to matters which are therein stated upon information and belief, and as to those matters he believes them to be true.



Charles E. Watkins
Senior Counsel, Covad Communications

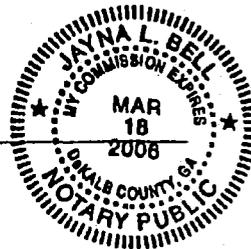
Sworn to and Subscribed to before me this 23rd day of June, 2004.

[SEAL]



Notary Public

My Commission Expires: 3/18/2006



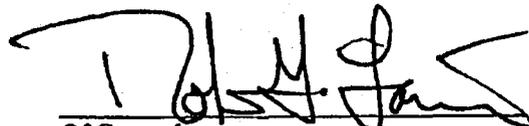
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following on this
the 24th day of June, 2004:

Francis B. Semmes, Esq. (via electronic delivery and via overnight delivery)
BellSouth
3196 Highway 280 South
Room 304N
Birmingham, Alabama 35243

BellSouth Telecommunications, Inc. (via overnight delivery)
BellSouth Local Contract Manager
600 North 19th Street, 8th Floor
Birmingham, Alabama 35203

ICS Attorney (via overnight delivery)
Suite 4300
675 W. Peachtree Street
Atlanta, Georgia 30375



Of Counsel

Exhibit B

ISSUE NO.	ISSUE DESCRIPTION	DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
26	<p>Local Switching – Line Cap and Other Restrictions (Attachment 2 – Sections 9.1.3.2 and 9.1.2):</p> <p>a) Should the interconnection agreement include language that prevents BellSouth from imposing restrictions on DeltaCom's use of local switching?</p> <p>b) Should BellSouth provide local switching at market rates where it is not required to provide local switching as a UNE?</p> <p>c) If so, what should be the market rate?</p>	<p>The existing agreement states that except as otherwise required, BellSouth will not impose restrictions on DeltaCom's use of local switching unless BellSouth can demonstrate harm to its network.</p>	<p>a) BellSouth is only required to provide local switching as set forth in FCC's rules, which do impose restriction on DeltaCom's use of local switching. BellSouth will provide local switching in accordance with FCC and Commission rules. This issue is more appropriately addressed in the TRA's Generic Local Switching Docket (02-00207) and, therefore, should be transferred to that docket.</p> <p>b) BellSouth will provide local switching at market-based rates where BellSouth is not required to unbundle local switching.</p> <p>c) An arbitration under §251 of the 1996 Act is not the appropriate forum for resolution of this issue.</p>	Open
27	<p>Treatment of Traffic Associated with Unbundled Local Switching but Using DeltaCom's CIC (Attachment 2 – Section 9.1.7):</p> <p>Should calls originated by a DeltaCom end-user or BellSouth end-user and terminated to either DeltaCom or BellSouth be treated as local if the call originates and terminates within the LATA?</p>	<p>If DeltaCom is using UNEP to serve a customer, DeltaCom wants the local calling area to be the entire LATA if the call originates and terminates within the LATA.</p>	<p>The CIC code is an access code and would result in call being billed as a toll call. This is simply an attempt by DeltaCom to avoid access charges.</p>	Open
28	<p>Local Switching (Attachment 2 – Sections 9.1.3 through 9.1.63):</p> <p>Should the existing language in the interconnection agreement regarding local switching and other issues be maintained?</p>	<p>Yes. DeltaCom wants to keep the language regarding local switching and other issues in the existing contract.</p>	<p>BellSouth's position is that its proposed language appropriately addresses BellSouth's provision of local switching. Inclusion of DeltaCom's proposed language is duplicative and unnecessary.</p>	Open

Exhibit C

BELLSOUTH TELECOMMUNICATIONS, INC.
DIRECT TESTIMONY OF KATHY K. BLAKE
BEFORE THE TENNESSEE REGULATORY AUTHORITY

DOCKET NO. 03-00119,

AUGUST 4, 2003

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from Florida State University in 1981 with a Bachelor of Science degree in Business Management. After graduation I began employment with Southern Bell as a Supervisor in the Customer Services Organization in Miami, Florida. In 1982, I moved to Atlanta where I held various positions involving Staff Support, Product Management, Negotiations, and Market Management within the BellSouth Customer Services and Interconnection Services Organizations. In 1997, I moved into the State Regulatory Organization with various responsibilities for testimony preparation, witness

1 support and issues management. I assumed my current responsibilities in July,
2 2003.

3
4 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

5
6 A. The purpose of my testimony is to present BellSouth's position on several
7 unresolved policy issues included in the arbitration between BellSouth and
8 ITC^DeltaCom Communications, Inc. ("DeltaCom"). My testimony
9 specifically addresses Issues 26, 36, 37, and 57. Each of these issues likely
10 will be impacted by the Federal Communications Commission's ("FCC's")
11 Triennial Review decision.

12
13 Q. PLEASE BRIEFLY DESCRIBE WHAT YOU MEAN BY THE TRIENNIAL
14 REVIEW DECISION AND HOW BELL SOUTH PROPOSES THE
15 AUTHORITY PROCEED IN ADDRESSING THESE ISSUES?

16
17 A. On February 20, 2003, the FCC adopted new rules concerning incumbent local
18 exchange carriers' ("ILECs") obligations to make elements of their network
19 available on an unbundled basis to new entrants. As of the date of my
20 testimony, the FCC has not issued its written order and, as such, the FCC's
21 February 20, 2003 action has no effect on this proceeding. BellSouth's
22 position is that the Tennessee Regulatory Authority ("TRA" or "Authority")
23 should consider the evidence put forth in this proceeding and render its
24 determination of the issues based on the **current** statutory and regulatory
25 requirements, and not by any party's speculation of what the FCC may

1 ultimately reflect in its written Triennial Review Order. In fact, it is unclear
2 which issues will be addressed and resolved solely by the FCC and which
3 issues will be relegated or delegated to state commissions to resolve. At the
4 time the ruling body's (FCC or state commission) order becomes effective, the
5 change of law provisions in the interconnection agreement will allow the
6 interconnection agreement to be revised accordingly. In addition, BellSouth
7 reserves the right to supplement its testimony following the issuance of the
8 FCC's written Triennial Review Order.

9
10 ***Issue 26: Local Switching – Line Cap and Other Restrictions (Attachment 2 –***
11 ***Sections 10.1.3.2 and 10.1.2):***

12 ***(a) Is the line cap on local switching in certain designated MSAs only for a***
13 ***particular customer at a particular location?***

14 ***(b) Should the Agreement include language that prevents BellSouth from***
15 ***imposing restrictions on DeltaCom's use of local switching?***

16 ***(c) Is BellSouth required to provide local switching at market rates where***
17 ***BellSouth is not required to provide local switching as a UNE? If so, what***
18 ***should be the market rate?***

19
20 Q. WHAT IS BELLSOUTH'S POSITION ON THESE ISSUES?

21
22 A. (a) When a particular customer has four or more lines within a specific
23 geographic area, even if those lines are spread over multiple locations,
24 BellSouth is not obligated to provide unbundled local circuit switching as long
25 as the other criteria in FCC Rule 51.319(c)(2) are met.

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(b) No, the interconnection agreement should not include language that prevents BellSouth from imposing restrictions on DeltaCom's use of local switching. The current FCC rules impose restrictions on DeltaCom's use of local switching and set forth the specific criteria under which BellSouth can avail itself of the local switching exemption. These rules should continue to apply unless and until they are lawfully amended by the FCC. BellSouth reserves the right to supplement its testimony following the issuance of the FCC's written Triennial Review Order.

(c) BellSouth will provide local switching at market-based rates where BellSouth is not required to unbundle local switching. The appropriateness of BellSouth's rates for providing local switching where it is not required by the Telecommunications Act of 1996 ("the Act") or the FCC's Rules implementing the Act are not governed by §§ 251 or 252 of the Act and, accordingly, it is not appropriate to address this matter in an arbitration proceeding.

Q. HAS THE AUTHORITY PREVIOUSLY ADDRESSED THE APPLICATION OF THE LINE CAP ON LOCAL SWITCHING (ISSUE 26A)?

A. Yes. In its decision in the BellSouth/AT&T arbitration proceeding, the Authority voted to "permit BellSouth to aggregate lines provided to multiple locations of a single customer to determine compliance with FCC Rule

1 51.319(c)(2).” (See Final Order of Arbitration Award in Docket No. 00-00079,
2 dated November 29, 2001, page 20) In support of this decision, the Authority
3 took guidance from the FCC’s Third Report and Order¹ in that the FCC chose
4 to utilize the term “customer” throughout its discussion, rather than “customer
5 location.”

6
7 The Authority subsequently clarified this decision in response to AT&T’s
8 Petition for Reconsideration of the Order. The Authority clarified that
9 “[a]lthough BellSouth can aggregate lines of a customer running from multiple
10 locations for the purpose of determining if BellSouth is obligated to provide
11 unbundled local switching pursuant to FCC Rule 51.319(c)(2), this aggregation
12 must be based on each location within the Nashville Metropolitan Statistical
13 Area served by AT&T.” (See Order Granting in Part Requests for
14 Reconsideration and Clarification, Docket No. 00-00079, dated April 22, 2002,
15 page 5) DeltaCom’s attempt to retain language from its existing
16 interconnection agreement that is contrary to both the Authority’s previous
17 findings and the FCC’s Order should be rejected. The language proposed by
18 BellSouth, however, fully comports with the rulings of this Authority and the
19 FCC and should be accepted.

20
21 ***Issue 36: UNE/Special Access Combinations (Attachment 2 – Sections 10.7 and***
22 ***10.9.1):***

23
24
25

¹ *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*,
FCC 99-328, CC Docket No. 96-98, released Nov. 5, 1999, paras. 293-297 (“Third Report and Order”).

1 (a) *Should DeltaCom be able to connect UNE loops to special access*
2 *transport?*

3 (b) *Are special access services being combined with UNEs today?*
4

5 Q. WHAT IS BELLSOUTH'S POSITION ON THESE ISSUES?
6

7 A. (a) DeltaCom should not be allowed to connect UNE loops to special access
8 transport. Nothing in the Act or the FCC rules requires BellSouth to combine
9 UNEs with tariffed services. The FCC's Rule regarding combinations (47
10 C.F.R. 51.315) relates to combinations of UNEs. It contains no requirements
11 for an ILEC to combine UNEs with tariffed services. Further, the FCC
12 specifically addressed this matter in its Supplemental Clarification Order,² in
13 which it rejected MCI's request to eliminate the prohibition on co-mingling.
14 The FCC is also addressing this issue in its Triennial Review proceeding.
15

16 (b) BellSouth has no agreements with other CLECs that require UNE/special
17 access services combinations.
18

19 Q. YOU MENTIONED THE FCC'S REJECTION OF MCI'S REQUEST TO
20 ELIMINATE THE PROHIBITION ON CO-MINGLING. COULD YOU
21 EXPLAIN HOW THAT RELATES TO THIS ISSUE?
22
23

24

² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act*
25 *of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587,
para. 28 (rel. June 2, 2000) ("Supplemental Order Clarification").

Exhibit D

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee**

**In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth
Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996**

Docket No. 03-00119

**BELLSOUTH TELECOMMUNICATIONS, INC.
POST-HEARING BRIEF**

**GUY M. HICKS
JOELLE J. PHILLIPS
333 Commerce Street, #2101
Nashville, TN 37201-3300
6151214-6301**

**R. DOUGLAS LACKEY
E. EARL EDENFIELD JR.
BellSouth Center - Suite 4300 675
West Peachtree Street, N.E.
Atlanta, GA 30375**

**ATTORNEYS FOR BELLSOUTH
TELECOMMUNICATIONS, INC.**

by adding language into the interconnection agreement that will impose burdens on BellSouth that are not required by law and that are contrary to the Authority's decision in the AT&T arbitration. The Authority should reject DeltaCom's attempt to add such language to the interconnection agreement. The language BellSouth proposes to include in the parties' interconnection agreement fully obligates BellSouth to provide unbundled local switching in accordance with FCC Rules. (Blake Rebuttal, p. 2-3) The Authority should approve such language until such time as its state proceedings under the FCC's TRO require a change.

BellSouth acknowledges the continuing obligation to provide local switching under Section 271 of the 1996 Act, even in those instances where local switching is no longer a UNE under Section 251 of the 1996 Act. (Milner, Tr. p. 528-529). Thus, the remaining issue is the price BellSouth will charge for non-UNE local switching.³¹

Issue 26(d): What should be the market rate?

DISCUSSION

As noted above, the TRA's authority to set rates in a Section 252 arbitration proceeding is limited to the establishment of "rates for interconnection services, or network elements according to subsection (d)", which is the TELRIC pricing standard for unbundled network elements. Obviously, the TELRIC pricing standards do not apply to non-UNE switching; thus, the Authority has no jurisdiction, as a matter of law, in the context of a Section 252 arbitration proceeding, to set such rates. The appropriate pricing standard for non-UNEs is found in Sections 201 and 202 of the 1996 Act, which

³¹ Issue 26(c), which addresses BellSouth's obligation to continue to provide local switching to DeltaCom in those situations where BellSouth has been relieved of the obligation to unbundle local switching (i.e., where local switching is no longer a UNE), has been deferred by the parties.

require "just and reasonable" rates.³² Thus, as demonstrated below, the FCC (not state commissions) will be the final arbiter of whether a non-UNE rate is "just and reasonable" under the 1996 Act.

The issue of just and reasonable rates, including an analysis of jurisdiction and compliance, is also discussed by the FCC in the TRO (*See generally*, ¶¶656-664). The FCC ruled:

Whether a particular checklist element's rate satisfies the just and reasonable standard of section 201 and 202 is a fact-specific inquiry that the Commission [the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy the standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

(TRO, at ¶664). As discussed in the TRO, the FCC has reserved for itself the jurisdiction to determine whether a rate is just and reasonable through either Section 271 long distance applications or federal complaint proceedings. BellSouth is not aware of any challenge to BellSouth's market rates during the course of BellSouth's Section 271 proceedings either at the state or federal level.

Also enlightening is the FCC's analysis of the manner in which a BOC can demonstrate that rates are just and reasonable; specifically through a showing that multiple agreements have the same market rate. Virtually every BellSouth Interconnection Agreement approved by the Authority, *including the current*

³² See, *UNE Remand Order*, 15 FCC Rcd at 3905, 11470.

BellSouth/DeltaCom Interconnection Agreement,³³ contains the very market rates about which DeltaCom complains. This showing alone, at least under the FCC's TRO analysis, demonstrates that BellSouth's market rates are just and reasonable.³⁴ Thus, the Authority should reject DeltaCom's position on this issue.

DeltaCom's case on this issue emphasized the "development" of BellSouth's rate and sought to make much of the lack of workpapers or cost information "justifying" the \$14.00 rate. This emphasis wholly misses the mark. The fact is that "market" rates are those that the market sets. As noted above, numerous other carriers are paying this same rate under their own approved interconnection agreements.

As a legal matter, DeltaCom has identified **no** legal precedent identifying any guidance on how a state agency would go about establishing a market rate - other than looking at what currently exists in the market. Now that the TRO has firmly clarified that the determination of the "justness" and "reasonableness" of such rates is a matter to be addressed to the FCC, the Authority should reject DeltaCom's effort to hold, at the state level, that the rate currently being charged to numerous other carriers is unjust or unreasonable.

³³ See, *BellSouth/DeltaCom Interconnection Agreement* dated April 24, 2001, Attachment 11, pages 33-34; See also, Amendment to the Interconnection Agreement signed by DeltaCom on September 19, 2002.

³⁴ DeltaCom contends that simply because the market rate is higher than the TELRIC rate, the market rate must be unreasonable. However, DeltaCom offers no comparison of BellSouth's market rate to the market rate other providers in BellSouth's region charge for local switching. Likewise, DeltaCom offers no evidence of DeltaCom's internal switching costs, or the costs to DeltaCom for placing its own switch, both of which could exceed BellSouth's market rate.

1 (The aforementioned cause came on to
2 be heard on Monday, June 21, 2004, beginning at
3 approximately 2:08 p.m., before Chairman Deborah Taylor
4 Tate, Director Pat Miller, and Director Ron Jones, when
5 the following proceedings were had, to-wit:)

6
7 CHAIRMAN TATE: Good afternoon. We
8 are without our docket clerk; I'm now lost.

9 We are here on Docket 03-00119,
10 petition for arbitration of ITC DeltaCom
11 Communications, Inc., and BellSouth Telecommunications,
12 Inc.

13 Why don't you-all just go ahead and
14 identify yourselves for the record so we'll know that
15 you were here and present.

16 MR. HICKS: Guy Hicks on behalf of
17 BellSouth Telecommunications.

18 MR. WALKER: Henry Walker and Nanette
19 Edwards here on behalf of ITC DeltaCom.

20 CHAIRMAN TATE: Thank you-all.

21 Do you-all have any questions for the
22 parties?

23 (No response.)

24 CHAIRMAN TATE: As you-all know for
25 some time, actually for months, I've really been

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1 encouraging commercially negotiated agreements between
2 the parties. This dates back to I think Chairman
3 Powell's first request for the parties to do that, and
4 then I tried to do that as well. Mr. Walker admonished
5 me not to undermine the FBO process, although it is
6 really not very much in my nature because, as you-all
7 know, I really am much more of a mediator.

8 I have played with cutting the numbers
9 in half. I have thought through this a lot, but in
10 order to, I think, be true to my requests and my
11 philosophies about market-based rates, what I would
12 like to propose is -- because from my reading of the
13 record, the only rate that has ever been negotiated was
14 the \$14 rate, and I would propose that we accept that,
15 that we continue the present rate on an interim basis
16 and subject to true up or true down as the case might
17 be. And I believe I said on an interim basis until
18 this Authority or the FCC or there is another rate
19 negotiated by the parties. I believe that that would
20 be most consistent with my previous request by the
21 parties and my philosophy regarding market-based rates.

22 DIRECTOR JONES: In this arbitration
23 we've gone back and forth with this issue, and we wound
24 up at a place where we requested final best offers to
25 make a determination as what the market rate should be

1 for unbundled switching provided pursuant to
2 Section 271 of the Act.

3 Based on that particular requirement,
4 unbundled network elements under Section 271, the
5 pricing for them and market base has a particular
6 standard of just and reasonable. And also as a final
7 best offer for a switching element only, that is the
8 rate that we requested in the FBO, and unlike DeltaCom,
9 BellSouth did not propose a standalone rate for
10 switching in its final best offer. And according to
11 the case law that exists with respect to a just and
12 reasonable rate, it covers the utility's operating
13 expenses as well as a fair return on investments, and
14 DeltaCom's FBO contained those elements.

15 On the other hand, BellSouth failed to
16 demonstrate that its proposed final best offer, its 271
17 switching rate, is at or below the rate at which
18 BellSouth offers comparable functions to similarly
19 situated purchasing carriers under its interstate
20 access tariff or that the 271 switching element final
21 best offer is reasonable by showing that it has entered
22 into arm's length agreements with other similarly
23 situated purchasing carriers to provide an inclusive
24 standalone switching at the rate proposed in the final
25 best offer.

1 CHAIRMAN TATE: If we could come back
2 to order and we will be back on the record.

3 DIRECTOR MILLER: Thank you, Madam
4 Chair.

5 DIRECTOR JONES: Director Miller,
6 before you continue, I would just like to clarify that
7 in my motion the interim period -- I'm defining that to
8 be consistent with the DeltaCom proposal. I just
9 wanted to make sure I defined the interim period.

10 DIRECTOR MILLER: Chairman Tate, I
11 would like to ask you to consider amending your motion
12 to adopt the DeltaCom final and best offer of 5.08 as
13 an interim rate subject to a true up based on the
14 adoption of a generic rate and further request that you
15 as chair open a docket to adopt a rate for switching
16 outside of 251 requirements.

17 I believe this approach to keep
18 negotiations ongoing in light of -- this is the best
19 approach to keep negotiations ongoing in light of the
20 continued uncertainty at the FCC. In addition, I
21 believe this approach will allow all interested parties
22 to have input into the final rate adopted, and since
23 it's impossible to predict either what will happen or
24 when it will happen, assigning an interim rate will
25 provide ITC DeltaCom with some level of relief and

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1 certainty while the true up will ensure that the
2 current negotiation -- negotiating position of the
3 parties remains intact, neither benefiting nor
4 penalizing either party through the establishment of an
5 interim rate.

6 CHAIRMAN TATE: I would certainly
7 agree that it would be appropriate to open a generic
8 docket.

9 Director Jones, would you agree with
10 that?

11 DIRECTOR JONES: Are you agreeing
12 with -- are you agreeing with Director Miller's motion?

13 CHAIRMAN TATE: No, I'm not. But I'm
14 asking if you would agree to the part about a generic
15 docket?

16 DIRECTOR JONES: It depends on the
17 motion.

18 CHAIRMAN TATE: Well, I guess I'm just
19 saying it sounds like the two of you-all have come to
20 an agreement, if I'm hearing both of you-all correctly,
21 about what would be the appropriate rate on an interim
22 basis subject to true up. And if we all agreed that a
23 generic docket could be opened, then at least I could
24 be in agreement with that portion.

25 DIRECTOR JONES: I am in agreement

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1 with that portion.

2 CHAIRMAN TATE: Good. Then I believe
3 that we've come to a -- I'm not in agreement with the
4 rest of the motion, but I would be regarding opening a
5 generic docket.

6 Gentlemen?

7 DIRECTOR JONES: One moment, please.

8 CHAIRMAN TATE: Certainly.

9 (Off the record.)

10 DIRECTOR JONES: Okay. We still

11 have -- left on your motion, Director Miller, is the
12 true up aspect of your motion, and I will --

13 DIRECTOR MILLER: Why don't I just
14 make a separate motion that we adopt the DeltaCom final
15 best offer of 5.08 and establish that as an interim
16 rate subject to true up and request that the chair open
17 a generic docket to adopt a rate for switching outside
18 251 requirements.

19 CHAIRMAN TATE: And I am in agreement
20 with all of that except for the rate, as noted in my
21 previous motion.

22 Director Jones?

23 DIRECTOR JONES: I do have a question,
24 Director Miller, as to what event will the true up be
25 trued? Will it be to the generic docket? Will it be

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1 to FCC interim rules or permanent rules, or to what
2 will the interim rate be trued?

3 CHAIRMAN TATE: Or to a negotiated
4 market-based rate.

5 DIRECTOR JONES: Or to some negotiated
6 rate.

7 DIRECTOR MILLER: Right. It would
8 be -- the purpose of the generic docket is to set a
9 rate applicable to every -- however, if in the interim,
10 the FCC intervenes and sets rules and preempts that,
11 then that will end the true up period or if commercial
12 negotiations are successful and they come up with a
13 rate on their own.

14 DIRECTOR JONES: I will agree to that.

15 CHAIRMAN TATE: I would just once
16 again encourage the parties strongly that negotiations
17 should be considered and that you-all move in that
18 direction.

19 And with that said, I think we're --
20 we can adjourn for today. Thank you-all for being
21 here.

22 (Proceedings concluded at
23 2:30 p.m.)

24
25

